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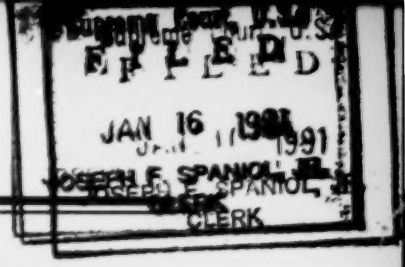

IN THE

Supreme Court of the United States

October Term 1990

CITY GAS COMPANY OF FLORIDA,

Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF CITY GAS COMPANY'S PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF CITY GAS COMPANY'S PETITION FOR WRIT OF CERTIORARI

The FLORIDA PUBLIC SERVICE COMMISSION (Commission), by its undersigned attorney, pursuant to Sup. Ct. R. 37.2, moves this Court for leave to file an *amicus curiae* brief in support of City Gas Company of Florida's (City Gas) Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. As grounds therefor, the Commission states as follows:

1. The Commission is an arm of the legislative branch of government, section 350.001, Flordia Statutes (1989), and is the state agency charged with the responsibility of regulating utilities in the public interest, section 350.011, Florida Statutes

(1989). The Commission has exclusive jurisdiction to regulate natural gas companies, as well as electric utilities, water and sewer utilities and telephone companies. Chapters 364, 366 and 367, Florida Statutes (1989).

2. The regulatory authority of the Commission over natural gas utilities is extensive and multi-faceted. Pursuant to the Legislature's clear intent to replace competition with regulation in the natural gas industry, the Legislature delegated to the Commission the authority to implement that policy to the end that the people of the State of Florida are assured adequate and safe utility service at fair, just and reasonable rates.

3. This case presents significant questions regarding the applicability of the federal antitrust laws to the conduct of public utilities, where such conduct is directly regulated and controlled by the Commission.

4. In this case, the Eleventh Circuit affirmed the district court's decision imposing federal antitrust liability on a Florida public utility for entering into a territorial agreement with another public utility. That agreement was reviewed and approved by the Commission and became an order of the Commission. The order approving the agreement was subsequently reviewed and affirmed by the Florida Supreme Court as being a valid exercise of delegated legislative authority. Notwithstanding these approvals, the federal district and circuit courts held the agreement, and, therefore, the Commission order, to be a violation of antitrust law and not entitled to protection under the state-action immunity doctrine.

5. This decision puts at risk every Commission order or rule, and utility action taken pursuant thereto, which may limit competition. The decision also leaves in question the Florida Supreme Court's authority to interpret Florida law when that law is considered in federal litigation.

6. Currently, there are pending two federal antitrust actions against Florida public utilities that involve the effect of Commission rules and orders and utility action taken pursuant thereto. One case involves a Commission-approved territorial agreement between two electric utilities, alleged to be in violation of federal antitrust laws.[1] The other case involves utility action taken pursuant to Commission orders and rules in the field of cogeneration and utility purchase of cogenerated power.[2] Both cases involve instances of Commission decisions which have been reviewed and sanctioned by the Florida Supreme Court.

7. The Commission has considerable expertise in the history of Florida's regulatory policy regarding territorial agreements. The Commission participated as *Amicus Curiae* in the proceedings below before the Eleventh Circuit to explain its jurisdiction over natural gas utilities in general, and to explain its jurisdiction over territorial agreements specifically.

8. The Commission asserts that the private parties in this case are not in the position that the Commission is to inform the Court regarding the effect of this case on the State of Florida's regulation of public utilities. The Commission is in the best position to inform the Court of the public interest considerations at stake in the correct resolution of this matter.

Pursuant to Sup. Ct. R. 37.2, the Commission sought the consent of both parties to this case for the filing of an *amicus*

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[1] *Union Carbide Corp. v. Florida Power & Light Co. & Florida Power Corp.*, Civil No. 88-1622-CIV-T-13C (M.D. Fla.).

[2] *TEC Cogeneration, Inc. et al. v. Florida Power & Light Co.*, Civil No. 88-2145 CIV-ATKINS (S.D. Fla.).

curiae brief. Consolidated Gas Company of Florida, Inc. refused to consent to the Commission's filing. Therefore, the Commission respectfully requests this Court's permission to file an *amicus curiae* brief for the reasons stated above.

Respectfully submitted,

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January 16, 1991

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE,* FLORIDA PUBLIC SERVICE COMMISSION IN SUPPORT OF CITY GAS COMPANY'S PETITION FOR WRIT OF CERTIORARI

The Florida Public Service Commission (Commission) submits this Amicus Curiae Brief in support of Petitioner, City Gas Company of Florida's (City Gas) Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. In this brief, the Commission will specifically address Question 2(b) presented in the petition:

> 2. Whether petitioner's conduct [in entering into a territorial agreement with Peoples Gas System] is protected from antitrust liability by the state action doctrine, given that: (b) . . . the territorial agreement was submitted to and approved by the FPSC

pursuant to regulatory authority granted by a state statute and confirmed by a controlling decision of the Florida Supreme Court?

I

Interest of Amicus Curiae

The Commission, an arm of the Legislature of the State of Florida, is directed by chapters 364, 366, and 367,[1] Florida Statutes, to regulate public utilities in the state. One of the long-settled regulatory activities of the Commission concerns the establishment of service territories through Commission-approved territorial agreements between natural gas utility companies and its policy favoring such agreements.[2]

The Florida Supreme Court, which has original jurisdiction to review Commission orders relating to regulation of gas [and electric] utilities, section 366.10, Florida Statutes, (1989),[3] held that chapter 366, Florida Statutes, authorized Commission approval of such agreements generally, as well as the specific Commission order approving City Gas' agreement with Peoples Gas System (Peoples Gas). *City Gas Company v. Peoples Gas System*, 182 So.2d 429 (Fla. 1965). This extensive opinion set out in great detail not only the legal and policy basis of the Court's decision that this Commission activity was

---

[1]The "very extensive authority" of the Commission over regulated utilities in the State of Florida and the public interest served thereby are described in *City Gas Co. v. Peoples Gas System*, 182 So.2d 429, 434-7 (1965), cited extensively, *infra*.

[2]Commission Order No. 3051 (1960). See Appendix.

[3]Section 366.10, Florida Statutes, states: As authorized by § 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the Commission relating to rates or *service* of utilities providing electric or *gas service*. (emphasis supplied.)

authorized, but also the role of territorial agreements in Florida's regulation of public utilities.

Despite this holding of Florida's highest court, the District Court found, and the Eleventh Circuit affirmed and reaffirmed *en banc*, that federal antitrust liability resulted from City Gas' act of

> agreeing in 1960 with Peoples Gas not to compete with each other in their respective territories in the sale of natural gas.

Consolidated Gas Co. of Florida v. City Gas Co., 880 F.2d 297, 304 (11th Cir. 1989).

In so holding, the courts below have misapplied the state action doctrine formulated by this Court in *Parker v. Brown*, 317 U.S. 343 (1942), and impaired the principles of federalism and comity underlying that decision. As a result, the regulatory authority of the Commission has been directly infringed. Private parties must now choose whether to comply with the Commission's orders, as approved by the state's highest court, or the conflicting decision of the federal court of appeals.

The failure of the courts below to accede to the statutory interpretation of the Florida Supreme Court in their state action analysis, as required by *Cotton States Mutual Insurance Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984), has placed the state action immunity of all Commission regulation in doubt. This error requires review by this Court because the Commission cannot assume that the holdings of Florida's highest court will be treated as authoritative,[4] and the Commission therefore supports City Gas' Petition For Certiorari.

---

[4]This is of particular concern to the Commission because the Florida Supreme Court is the primary reviewing court interpreting the regulatory statutes under which the Commission is authorized to act. n. 3, *supra*.

Moreover, the Commission urges, in the alternative, that this holding be reviewed even if other questions presented in the petition are not reviewed.[5]

II

Summary of Argument

The City Gas/Peoples Gas Territorial Agreement Is Immune From Antitrust Liability Under the State Action Doctrine

In their partial dissent to the Eleventh Circuit's *en banc* affirmance, Judges Johnson and Kravitch analyzed the state action immunity of the City Gas/Peoples Gas territorial agreement. The Commission concurs in and adopts that analysis, which appears at 912 F.2d 1262, and, would further state:

A. The Eleventh Circuit Improperly Applied *Midcal's* First Prong, "Clear Articulation"

The Commission reviewed and approved the territorial agreement at issue. Moreover, the Florida Supreme Court held that the Commission's approval of the gas utility territorial agreement specifically, and such agreements generally, was valid and authorized by the legislative grant of regulatory

[5]It is noted in this connection that the ten judges of the Eleventh Circuit *en banc* were split five to five on the territorial agreement issue and that of the five judges who held the territorial agreement to be immune under the state action doctrine from antitrust liability, three held for City Gas and two held for appellee, Consolidated Gas, on the remaining issues. *Consolidated Gas Co. of Fla., Inc., v. City Gas Co. of Fla.*, 912 F.2d 1262, 1338, (11th Cir. 1990) (*en banc*). Clearly, the territorial agreement holding below can and should be reviewed regardless of how this Court disposes of the other issues in this case.

authority to the Commission. *City Gas v. Peoples Gas System*, 182 So.2d 429 (Fla. 1965).

To determine whether the state action doctrine of *Parker v. Brown* was applicable to the territorial agreement to immunize it from federal antitrust liability, the Eleventh Circuit applied the two-pronged test of *California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980) (*Midcal*). The Eleventh Circuit acknowledged that it was appropriate to look to the relevant statutory construction of the state's highest court in applying the first prong of *Midcal*; i.e., whether private conduct is immune pursuant to a clearly articulated state policy.

Instead of then relying on the Florida Supreme Court's holding that Commission-approved gas utility territorial agreements were valid and authorized by the Legislature and were, therefore, the clearly articulated policy of the state as sovereign, the Eleventh Circuit ignored the state's highest court and found that there was no clearly articulated policy.

Citing *dicta* in a Commission order concerning questions or doubts about the Commission's legal authority, the Eleventh Circuit ignored the fact that the Florida Supreme Court has never receded from its opinion in *City Gas v. Peoples Gas* and that the *Midcal* clear articulation test was therefore met under this Court's opinion in *Southern Motor Carriers Rate Conference, Inc, v. United States*, 471 U.S. 48, 64 (1985).

B. The Eleventh Circuit Misapplied *Midcal's* Second Prong, "Active Supervision"

Though the state officials of the Commission reviewed the territorial agreement and the Florida Supreme Court affirmed the authority of the Commission to do so, as well as the invalidity of such agreements when not approved by the Com-

mission, the Eleventh Circuit ignored the fact that this met *verbatim* the formulation of the active supervision test cited by the Eleventh Circuit itself. *Patrick v. Burget*, 456 U.S. 94 (1988).

Instead, the Eleventh Circuit's active supervision analysis was tainted by the same error noted previously. Citing *dicta* about questions or doubts appearing in a *Commission* order, the Eleventh Circuit speculated that the Commission might not feel confident about its ability to disapprove such territorial agreements.

In so finding, the Eleventh Circuit again ignored various holdings of the Florida Supreme Court which stated, as a matter of law, that the Commission had the authority to approve or disapprove such agreements and that such agreements were invalid in the absence of Commission approval. The *dicta* supplied no valid reason for the Eleventh Circuit to find that the territorial agreement was not actively supervised by the Commission when in fact it was. The Eleventh Circuit's disregard of the Florida Supreme Court's statutory construction in *City Gas v. Peoples Gas* and other relevant cases impairs the principles of federalism and comity at the heart of the state action doctrine and facially conflicts with the First Circuit's opinion in *New England Motor Rate Bureau, Inc. v. Federal Trade Commission*, 908 F.2d 1064 (1st Cir. 1990).

III

Argument

The City Gas/Peoples Gas Territorial Agreement Is Immune From Antitrust Liability Under the State Action Doctrine

As relevant to this brief, the Eleventh Circuit affirmed with an opinion, *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 880 F.2d 297 (11th Cir. 1989), the District Court's finding that the City Gas/People Gas territorial agreement was not immune from antitrust liability under the state action doctrine. This holding was re-affirmed *per curiam* by the Eleventh Circuit *en banc*. It was also addressed, however, by Judges Johnson and Kravitch in their partial dissent, 912 F.2d at 1262, and the Commission concurs in and adopts their analysis of that specific issue. In addition, the Commission would state as follows:

A. The Eleventh Circuit Improperly Applied *Midcal's* First Prong, "Clear Articulation"

In *Parker v. Brown, supra*, this Court held that the Sherman Act was not intended to reach the anticompetitive activity contemplated in state regulation. *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980), (*Midcal*), established a two-pronged test for private party anticompetitive conduct to warrant *Parker* immunity: the conduct had to be pursuant to a clearly articulated policy of the state to displace competition with regulation and the conduct had to be closely supervised by the state. *Southern Motor Carriers*, in turn, established that

> a private party need not "point to specific, detailed legislative authorization" for its challenged conduct.

> As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

Southern Motor Carriers v. United States, 471 U.S. 48, 64 (1985).

Applying the foregoing authority, the territorial agreement met the first prong of the *Midcal* test for state action immunity. Section 366.03, Florida Statutes, gives the Commission jurisdiction to:

> ***regulate*** and ***supervise*** each public utility with respect to its ***rates*** and ***service***. (emphasis supplied)

The Commission, in its order approving the territorial agreement, explicitly relied on this clearly articulated policy of the Legislature to displace competition with regulation:

> It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by competing utilities are definitely in the public interest and should be encouraged and approved ***by an agency such as this, which is charged with the duty of regulating public utilities*** in the public interest. (emphasis supplied).

Commission Order No. 3051. See Appendix.

The Florida Supreme Court ultimately addressed the question of whether the Commission's approval of the City Gas/Peoples Gas territorial agreement was authorized by the Legislature's grant of regulatory authority. The Court answered in the affirmative, based on an extensive and detailed statutory construction of chapter 366, Florida Statutes:

> We also conclude that *the Commission has* adequate implied *authority under Chapter 366 to validate such agreements* as the one before us. (emphasis supplied) *City Gas Company v. Peoples Gas System, Inc.*, 182 So.2d 429, 436 (1965)

That should have been found by the courts below to satisfy the first prong of *Midcal*. As stated in *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 667,

> [s]tate courts have a *right* to construe their own statutes, and *federal courts are bound* by that state interpretation. [citation omitted]. (emphasis supplied)

Indeed, the Eleventh Circuit at least partially corrected the District Court's error in disregarding the Florida Supreme Court's opinion:

> When examining whether private conduct is immune pursuant to a clearly articulated policy, *it is proper to look to state supreme court construction of the relevant statutes*. [citations omitted] (emphasis supplied)

880 F.2d at 302-3.

Unfortunately, the Eleventh Circuit then found that, as a matter of "federal antitrust law," the first prong of *Midcal* was not met because of :

> 1. The Commission's own expression of doubt as recently as 1985 as to its authority to establish exclusive territories or to resolve territorial disputes between natural gas utilities.
>
> 2. . . . [City Gas' contention] to the Commission that the agreement was invalid under federal antitrust law and the Commission should not force City Gas to adhere to it.

> 3. . . . the clear statutory grant of authority of exclusive territories for other [non-gas] entities, the absence of authority for territorial agreements for natural gas utilities [*but, see,* 182 So. 2d at 436], and the uncertainty with which the Commission has approached these agreements. . . .

880 F.2d at 303.

None of these reasons (which are the only reasons given by the Eleventh Circuit for its failure to find that the state's policy was "clearly articulated") are apposite to the *Midcal* test, which tests whether the *state's policy* is clearly articulated, *not whether doubts or questions were ever raised about the Commission's legal authority* in *dicta*. *Midcal, supra*, 445 U.S. 87, 105 (1980).

The state's *policy* of replacing competition between natural gas utilities with regulation in the form of Commission-approved territorial agreements was established in 1960 and affirmed as the *authorized policy of the State as sovereign* by the Florida Supreme Court in 1965. *City Gas v. Peoples Gas*, 182 So.2d at 436.

Nothing cited by the Eleventh Circuit or the district court indicates that the Commission or the Florida Supreme Court had altered *that clearly articulated policy* ONE IOTA. The *dicta* cited as the Commission's "doubts" in 1985 referred to concern about the Commission's *legal position* as the material quoted in the District Court opinion demonstrates. *See*, 665 F.Supp. at 1530.

At bottom, no such expression of concern in *dicta* could legally affect the *Midcal* "clear articulation" test unless and until the Florida Supreme Court could be persuaded to recede from its opinion in *City Gas v. Peoples Gas. That has never happened.* Moreover, the Florida Supreme Court explicitly re-

jected the argument that it should so recede. *Peoples Gas System v. Mason*, 187 So.2d 335, 339-40 (1966).

For the same reasons, the contentions of City Gas to the Commission cited by the Eleventh Circuit are even less relevant to the analysis of the first prong of *Midcal*. City Gas was never able to persuade the Florida Supreme Court to alter ONE IOTA its holding that the Florida Legislature had authorized the Commission to replace competition with regulation by approving territorial agreements between natural gas utilities. At most, the suggestions resulted in the cited *dicta*, which had no legal effect even in the Commission proceeding concerned, and should have had none in this case, *a fortiori*.

Moreover, the claimed circumstance that certain non-gas utilities had express statutory authorization for Commission approval of territorial agreements provides no justification to ignore the Florida Supreme Court's holding in *City Gas v. Peoples Gas, supra*, for the purpose of determining state action immunity.[6] *Southern Motor Carriers, supra, negated* the

[6]Both lower courts reasoned that Florida statutes explicitly authorized electric utility territorial agreements and that, therefore, the regulatory scheme for electric utilities differed from that for gas utilities. This analysis was incorrect. During the relevant time period, Commission approval of territorial agreements for both investor-owned natural gas *and* electric utilities was based on implied authority affirmed (in numerous cases) by the Florida Supreme Court.

A statute was passed in 1974 (See Appendix) explicitly extending Commission authority to include approval of territorial agreements involving *municipal* and *cooperative* electric utilities because Commission authority over municipals and cooperatives was more limited and, therefore, a specific statute was needed. In contrast, "The powers of the Commission over . . . *privately-owned* utilities is *omnipotent* within the confines of the statute and the limits of organic law." (emphasis supplied) *Storey v. Mayo*, 217 So.2d 304, 307 (Fla. 1968), *cert. den.* 395 U.S. 909, 895 S. Ct. 1751, 23 L.Ed.2d 222 (1969).

Therefore, no dissimilarity between gas and electric utility regulation in Florida exists to justify a denial of state action immunity for the territorial agreement between City Gas and Peoples Gas.

requirement of express statutory authorization *as a matter of federal antitrust law*.[7]

Finally, there has been *no* Commission or Florida Supreme Court "uncertainty" as to the state *policy* to replace competition with regulation by means of Commission-approved gas utility territorial agreements, a policy which could hardly have been more clearly articulated. Commission Order No. 3051 as affirmed, *City Gas v. Peoples Gas*, 182 So.2d 429. This Court should not confuse *dicta* in a Commission order with the *state policy* which is relevant to the *Midcal* tests. State action immunity should not come and go depending upon the confidence or doubt expressed about legal authority in *dicta*, but, as a matter of law, be based on the interpretation by the highest state court of the relevant statutes governing the state agency and its officials. *Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky.*, 857 F.2d 354 (6th Cir. 1988).

B. The Eleventh Circuit Improperly Applied *Midcal's* Second Prong, "Active Supervision"

Citing *Patrick v. Burget*, 456 U.S. 94 (1988), the Eleventh Circuit noted that

> Active supervision requires that *state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy*. (emphasis supplied.)

In its order reviewing and approving the City Gas/Peoples Gas territorial agreement, the Commission stated that the agreement

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[7]As stated therein, "a private party acting pursuant to an anticompetitive regulatory program need not 'point to specific, detailed legislative authorization'" to meet *Midcal's* first prong. 471 U.S. at 64.

> can have no validity without the approval of this Commission.

Commission Order No. 3051.

Obviously, the active supervision test of *Midcal*, as restated in *Patrick*, is met. The Commission (*state officials*, as contrasted with doctor-competitors in *Patrick*) *reviewed* the territorial agreement and *disapproved as invalid ab initio* any such agreements not receiving Commission approval.

Once again, however, the Eleventh Circuit's analysis is tainted by the *same error* apparent previously. Accordingly, the Eleventh Circuit held:

> That the Commission has *expressed doubt* about its authority to either establish exclusive agreements or to resolve disputes between natural gas utilities, unlike its express authority to do so for electric utilities [but, *see*, n. 5, *supra*], does not demonstrate to the Court that the Commission *felt confident* it could "disapprove [agreements] that fail to accord with state policy." (emphasis supplied)[8]

Like the "clear articulation" first prong of *Midcal*, the "active supervision" second prong of *Midcal* relates to what the Commission *did and had the actual legal authority to do*, not to whether doubts were expressed in *dicta* about that authority. Unless the Commission was able to persuade the Florida Supreme Court to recede from its decision in *City Gas v. Peoples Gas*, which it did not, the cited doubts *had no legal effect*. Moreover, the doubts expressed in 1985 certainly did

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[8]Here, the Eleventh Circuit again ignored the Florida Supreme Court's affirmance of Commission Order No. 3051, which stated that such agreements "can have no validity without the approval of this Commission." *See* also, *Peoples Gas System v. Mason*, 187 So.2d 335, 339-40 (1966).

not change the fact that City Gas' and Peoples Gas' "particular anticompetitive act" of entering into a territorial agreement was reviewed by the *state officials* of the Commission, thus meeting the requirement of close supervision as stated in *Patrick, verbatim.*

Again, citation by the Eleventh Circuit of the express authority for electric utilities as relevant to its finding that *Midcal's* second prong was not met is incorrect as a matter of state law, *City Gas v. Peoples Gas,*[9] and federal antitrust law, *Southern Motor Carriers.*[10] Nor do any federal antitrust cases require that the state create "standards" for territorial agreements beyond that cited by the Commission; i.e., that *the public interest was better served by replacing competition with regulation in* the form of gas-utility territorial agreements so as to avoid the unnecessary and costly duplication of facilities that results from competition between natural monopolies:

> Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic *regulation* in such cases, is better than, and *takes the place of competition.* (emphasis supplied)

Commission Order No. 3051.

As recently stated by the United States Court of Appeals, First Circuit, in *New England Motor Rate Bureau, Inc. v. Federal Trade Commission,* 908 F.2d 1064 (1st Cir. 1990),

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[9]As stated by the Florida Supreme Court, ". . . *we reject* the notion of *any such distinction between express and implied statutory authority* as posited by the chancellor. The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute [citation omitted]. *Neither category is possessed of greater dignity or effect.*" 182 So.2d at 436-7. (emphasis supplied)

[10]n. 7, *supra.*

> Where the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state courts, and demonstrates some basic level of activity directed toward seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established [as to the "active supervision" prong of *Midcal, Patrick*]. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing for the state's own action, it would become a means for federal oversight of state officials and their programs.

The Eleventh Circuit opinion clearly conflicts with this First Circuit analysis. By its attempted federal oversight of every expression of concern by state officials about their legal authority, the Eleventh Circuit has indeed turned the state action doctrine on its head. There is no authority for the Eleventh Circuit's holding that state action immunity is lost because of the cited *dicta*.[11] Florida's regulatory program providing for Commission-approved gas utility territorial agreements has been clearly articulated and closely supervised for thirty years. Commission Order No. 3051; *City Gas v. Peoples Gas, supra; Cotton States, supra*. For *Midcal* purposes, the question is *not* whether questions or doubts were ever raised about the Commission's legal authority during that time, but whether, *as a matter of law*, the *state policy* to replace competition with regulation was clearly articulated and activity engaged in pur-

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[11] There is irony, however, in that whatever questions might have concerned these officials because their authority was implied rather than express should not have included loss of state action immunity. *Southern Motor Carriers*, n. 7, *supra*.

suant to it was actively supervised. *As a matter of law*, the relevant cases and orders answered that question in the affirmative. This Court should correct the courts below, which ignored those cases and orders in favor of irrelevant *dicta*.

CONCLUSION

In denying state action immunity for the City Gas/Peoples Gas territorial agreement, the Eleventh Circuit failed to adhere to the principles of comity and federalism which have long guided this Court's state action jurisprudence.

Both the correct resolution of that issue and the continued viability of Florida's regulation of public utilities require that certiorari be granted to review and reverse that holding of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

BEFORE THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION

DOCKET NO. 6231-GU

ORDER NO. 3051

In re: Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida.

ORDER APPROVING AGREEMENT

BY THE COMMISSION:

Peoples Gas System, Inc. and City Gas Company of Florida are gas public utilities operating under the jurisdiction of the Florida Railroad and Public Utilities Commission pursuant to Chapter 366, Florida Statutes. Said utilities have filed with this Commission a copy of a Territorial Agreement entered into between them on September 9, 1960. The Territorial Agreement is an agreement between said companies as to the territorial service area boundary between said two companies in Dade and Broward Counties, Florida. Its approval is requested by the Commission.

Chapter 366, Florida Statutes, does not authorize the Commission to grant franchises or certificates of public convenience and necessity to electric and gas public utilities. The Commission's jurisdiction under said chapter extends to the rates, service, and the issuance and sale of certain securities of public utilities as defined therein. In the exercise of this jurisdiction, the Commission is specifically authorized to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the

convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto. Obviously, any agreement between two gas utilities which has for its purpose the establishing of service areas between the utilities will, in effect, limit to some extent the Commission's power to require additions and extenions to plant and equipment reasonably necessary to secure adequate service to those reasonably entitled thereto. In our opinion, such a limitation can have no validity without the approval of this Commission.

It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest. Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there inevitably will be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste. In the absence of a specific statute limiting the service areas of various public utilities, territorial agreements such as we are concerned with here, constitute no unreasonable restriction on the Commission's powers, but actually assist the Commission in the performance of its primary function of procuring for the public essential utility services at reasonable costs.

Based upon our study of the Territorial Agreement under consideration and the circumstances surrounding the execution of said agreement, it is our opinion that said agreement is in the public interest and should be approved by this Commission.

NOW, THEREFORE, IN CONSIDERATION THEREROF, it is

ORDERED by the Florida Railroad and Public Utilities Commission that the Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida as of September 9, 1960, be and the same is hereby approved.

By Order of Chairman Jerry W. Carter, Commissioner Wilbur C. King, and Commissioner Edwin L. Mason, as and constituting the Florida Railroad and Public Utilities Commission, this 9th day of November, 1960.

/s/ [Illegible]

EXECUTIVE SECRETARY

(SEAL)
GPM

APPENDIX B

CHAPTER 74-196

Committee Substitute for House Bill No. 1543

AN ACT relating to the Florida public service commission; adding subsections (2) and (3) to §366.04, Florida Statutes, extending commission jurisdiction over rural electric cooperative and municipal electric utilities for certain purposes; authorizing the commission to plan and develop a coordinated electric power grid; adding subsections (7) and (8) to §366.05, Florida Statutes, authorizing the commission to require certain reports and to require necessary facilities for the reliability of the energy grid; creating §366.05, Florida Statutes, providing for availability of energy reserves; creating §366.01, Florida Statutes, providing for a study of rate structure by the legislature; providing an appropriation; amending §366.11, Florida Statutes, providing limitations on certain exemptions; creating §366.015, Florida Statutes, directing the Florida public service commission to assume primary responsibility for initiation of interagency liaison in all technical areas affecting utilities under its primary jurisdiction; providing an effective date:

Be It Enacted by the Legislature in the State of Florida:

Section 1. Section 366.04, Florida Statutes, is amended by adding subsections (2) and (3) to read;

366.04 Florida public service commission; jurisdiction:

(2) In the exercise of its jurisdiction the commission shall have power over rural electric cooperative and municipal electric utilities for the following purposes:

(a) To prescribe uniform systems and classifications of accounts.

(b) To prescribe a rate structure for all electric utilities.

(c) To require electric power conservation and reliability within a coordinated grid for operational as well as emergency purposes.

(d) To approve territorial agreements between and among rural electric coopeatives, municipal electric utilities, and other electric utilities under its jurisdiction or any of them; provided, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction or any of them. In resolving territorial disputes the public service commission may consider, but not be limited to the ability of the utilities to expand services within their own capabilities, the nature of the area involved including population and the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. No provision of this chapter shall be construed or applied to impede, prevent or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on the effective date of this act, provided, however, existing territorial agreements shall not be altered or abridged hereby.

(3) The commission shall further have jurisdiction over the planning, development and maintenance of a coordinated electric power grid throughout Florida, to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Section 2, Section 366.05, Florida Statutes, is amended by adding new subsections (7) and (8) to read:

366.05 Powers:

(7) The commission shall have the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids.

(8) If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after holding hearings as provided by law, and after a finding that mutual benefits will accrue to the public utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to insure compliance. The electric utilities involved in any action taken or orders issued pursuant to this subsection shall have full power and authority notwithstanding any general or special laws to the contrary, to jointly plan, finance, build, operate or lease generating and transmission facilities and shall be further authorized to exercise the powers granted to corporations in chapter 361, Florida Statutes. Provided that this subsection shall not supersede or control any provision of the electric power plant siting act, sections 403.501 thru 408.516, Florida Statutes, 1973.

Section 3. Section 366.055, F.S., is created to read:

366.055 Availability of and payment for energy reserves. —

(1) Energy reserves of all utilities in the Florida energy grid shall be available at all times to insure that grid reliability and integrity are maintained. The commission is hereby authorized to take such action as necessary to assure compliance; provided, however, prior commitments as to energy use in interstate commerce as approved by the Federal Power Commission; commitments between one electric utility and another which have been approved by the Federal Power Commis-

sion; or commitments between an electric utility which is a part of the energy grid created herein and another energy grid shall not be abridged or altered except during an energy emergency as declared by the governor and cabinet.

(2) When the energy produced by one electric utility is transferred to another or others through the energy grid and under the powers granted by this section, the commission shall direct the appropriate recipient utility or utilities to reimburse the producing utility in accordance with the latest wholesale electric rates approved for the producing utility by the Federal Power Commission for such purposes.

Any utility which provides a portion of those transmission facilities involved in the transfer of energy from a producing utility to a recipient utility or utilities shall be entitled to receive an appropriate reimbursement commensurate with the transmission facilities and services provided. Provided further, no utility shall be required to sell purchased power to a recipient utility or utilities at a rate lower than the rate at which the power is purchased from a producing utility.

(3) To assure efficient and reliable operation of a state energy grid, the commission shall have the power to require any electric utility to transmit electric energy over its transmission lines from one utility to another or as a part of the total energy supply of the entire grid, subject to the provisions hereof.

Section 4, Section 366.061,Florida Statutes, is created to read:

366.061 Electric utility rate structure study. —

(1) The legislature finds that over the past twelve (12) years electric power demand has been growing at an annual rate of approximately eleven (11) percent and that the impact of this growth rate on required electrical rate needs adequate investigation.

(2)(a) There is created a joint select committee of the senate and house of representatives composed of five (5) members of the senate appointed by the president of the senate and five (5) members of the house of representatives appointed by the speaker of the house of representatives. The committee shall conduct or contract with consultants of national reputation to conduct a study of rate structure of all electric utilities in Florida including rural electric cooperative and municipal electric utilities. A final report shall be submitted to the public service commission and the legislature by March 15, 1975. The members of the committee shall serve until the end of the 1975 regular session of the legislative at which time the committee shall terminate.

(b) Among the factors to be examined by the study are the form of marginal costs of service to new customers, the ability technically and economically, to engage in peak load pricing and the magnitude and details of the economic relationships in Florida between the demand for electricity and its price, as well as other factors which may affect decisions on alternative rate structures.

(3) There shall be appropriated from the general revenue fund the sum of fifty thousand ($50,000) with which to conduct its study during the fiscal year 1974-75.

Section 5. Section 366.11, Florida Statutes, is amended to read as follows:

366.11 Certain exemptions: No provision of this chapter shall apply in any manner *other than as specified in section 366.04(2) and (3), section 366.05(7) and (8), section 366.055, and section 366.001, Florida Statutes,* to utilities owned and operated by municipalities whether within or without any municipality, or by cooperatives organized and existing under the rural electrification cooperative law of the state, nor to the sale of electricity, manufactured gas or natural gas at wholesale by any

public utility to, and the purchase by, any municipality or cooperative under and pursuant to any contracts now in effect or which may be entered into in the future, where such municipality or cooperative is engaged in the sale and distribution of electricity, manufactured or natural gas, nor to the rates provided for in such contracts. ***Further the provisions of section 350.78, Florida Statutes, shall not apply to municipally owned and operated electric utilities and rural electric cooperatives.*** Nothing herein shall restrict the police power of municipalities over their streets, highways and public places or the power to maintain or require the maintenance thereof, nor the right of a municipality to levy taxes on public services under §167.431, Florida Statutes, nor affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise, nor repeal §167.22, Florida Statutes.

Section 6. Section 366.015, Florida Statutes, is created to read:

366.015 Interagency liaison. — The Florida public service commission is directed to provide for and assume primary responsibility for establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rule-making authority affect those utilities which the commission has primary regulatory jurisdiction. This liaison shall be conducted at the policy-making levels as well as department, division or bureau levels. Active participation in other agency public hearings is encouraged to transmit the commission's policy positions and information requirements in order to provide for more efficient regulation.

Section 7. This act shall take effect July 1, 1974.

Approved by the Governor June 17, 1974.

Filed in Office Secretary of State June 81, 1974.